STATE OF MICHIGAN

COURT OF APPEALS

FRANK M. JOHNSON,

Plaintiff-Appellee/Cross-Appellant,

v

SHARON P. JOHNSON,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
March 27, 2007

No. 266026
Washtenaw Circuit Court
LC No. 99-014929-DM

Before: Smolenski, P.J., and Saad and Wilder, JJ.

PER CURIAM.

This is the second time this matter is before this Court. Previously, we issued an opinion affirming in part, reversing in part, and remanding the case to the trial court for further proceedings. *Johnson v Johnson*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2004 (Docket No. 246484). Each party appeals as of right from the trial court's order entered on remand.

Both parties take issue with the trial court's award of attorney fees on remand. We review de novo as a question of law whether a trial court properly followed an appellate ruling on remand. See *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 134-135; 580 NW2d 475 (1998). We review for an abuse of discretion the decision to award attorney fees, as well as the determination of the reasonableness of the fees requested. *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006). An abuse of discretion occurs when a court selects an outcome that is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"A ruling by this Court binds the trial court on remand, pursuant to the law of the case doctrine." *Sumner v Gen Motors Corp (On Remand)*, 245 Mich App 653, 661; 633 NW2d 1 (2001). Under the law of the case doctrine, "a trial court may not take any action on remand that is inconsistent with the judgment of the appellate court." *Kalamazoo*, *supra* at 135. Instead, "[i]t is the duty of the lower court . . . on remand, to comply strictly with the mandate of the appellate court." *Rodriguez v Gen Motors Corp (On Remand)*, 204 Mich App 509, 514; 516 NW2d 105 (1994).

On first appeal, this Court specifically considered and rejected the trial court's earlier determination concerning the trial court's award of attorney and expert fees and costs:

> The trial court adopted Frank's position on the issue of attorney fees "in full as if fully set forth here." The parties stipulated below to all attorney and expert fees and costs through December 18, 2001. Frank asserted that Sharon's attorney fees are unreasonably high; nearly three times the amount of his attorney fees, and that his payment of $41,936 of Sharon's fees is a "sufficient and fair amount."
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> On appeal, Frank reiterates these arguments, and adds that "Given the substantial estate awarded to the appellant, and the income she can earn on the property, when combined with her own ability to work, this is an adequate contribution to the appellant's attorney fees."
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> We conclude that Sharon alleged facts sufficient to show that payment of her remaining attorney and expert fees would require her to invade her property settlement, on which she relies for support. Frank's arguments, adopted by the trial court, and his appeal brief do not adequately respond to Sharon's contention that she will have to invade her property settlement. Given that fact, and the vast disparity in the parties' incomes and earning potential, we conclude that the trial court abused its discretion by ordering Sharon to pay her remaining attorney and expert fees and costs.
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> On the question whether to award Sharon appellate fees, the record establishes Frank's ability to pay them and, under the circumstances presented, we conclude that appellate fees should be awarded to Sharon.

This Court then "reverse[d] the [trial] court's order regarding attorney fees" and "order[ed] Frank to pay Sharon's outstanding attorney and expert fees and costs from December 18, 2001 forward, and that he pay Sharon's appellate fees as well."

On remand, the trial court initially made the following determination concerning attorney fees:

> Addressing the issue of attorneys fees first, the court concludes the Court of Appeals intended this court to make a determination of the reasonable attorneys fees that were incurred and are being incurred by [Sharon]. That is, the court is not to simply take billing statements issued to [Sharon] and tell [Frank] to pay them, but rather to evaluate the fees based on the circumstances presented and require [Frank] to pay those which are reasonable under the circumstances of this case. It is consistent with Michigan law for the court to consider [Frank's] fees when evaluating the reasonableness of [Sharon's] fees. [Frank's] fees through trial were some $42,000. In making this determination, the court considers the size of the marital estate; the responsibility involved; the character of the work involved; the results achieved; the knowledge, skill and judgment required and used; the time and services required; the manner and promptness of performing the duties; the custom in this community for the assessment of fees under the circumstances presented; the amount of risk; and the estimation by the attorney of the value of the services. The court concludes [Frank] should be responsible for $46,200 of attorney fees to [Sharon]. This is 10% higher than those fees he paid to his own counsel. It is hoped this guideline will be of sufficient clarity to permit

> the parties to work together to calculate fees subsequent to trial and up to this time as well.

The trial court then entered a "Further Award of Attorney Fees and Expert Fees," which provided:

> (a) Plante & Moran was a joint expert of both parties in this case as clearly reflected on Joint Trial Exhibit 3 (JX3), not [Frank's] expert and, therefore, pursuant to the Michigan Court of Appeals Decision, [Sharon] is not awarded any of the fees she paid to Plante & Moran.
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> (b) [Sharon] is awarded $10,179.50 of expert fees to be paid by [Frank] for the fees charged by Gary Leeman, CPA.
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> (c) [Sharon] is awarded post-trial attorney fees (for the period of time from approximately 12/18/01 through 1/20/03) to be paid by [Frank] in the amount of $37,458.00.
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> (d) [Sharon] is awarded appellate fees (for the period of time from approximately 1/20/03 through 11/18/04) to be paid by [Frank] in the amount of $35,769.00.
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> (e) [Sharon] is awarded as further appellate fees, fees incurred during the remand proceedings (which this Court has earlier ruled it deems to be appellate fees pursuant to the decision of the Michigan Court of Appeals) for the period of time from 11/19/04 forward to be paid by [Frank] in the amount of $23,045.00.

On remand, instead of following this Court's explicit directive, the trial court sua sponte decided to determine the reasonableness of all attorney and expert fees and costs, despite the parties' stipulation to those incurred through December 18, 2001. The trial court on remand was bound by this Court's ruling, pursuant to the law of the case doctrine. *Sumner*, *supra* at 661. By taking action on remand that was inconsistent with this Court's decision, the trial court failed to follow the law of the case established in Sharon's first appeal. *Kalamazoo*, *supra* at 135, 138.

Regarding the amount of attorney and expert fees and costs through December 18, 2001, the parties stipulated to those amounts. The joint stipulated trial exhibit revealed that as of December 18, 2001, Sharon owed $94,119.37 in outstanding attorney fees; $10,179.50 in outstanding CPA fees; $220.75 in outstanding costs; and that the parties owed $14,300 in outstanding fees to Plante Moran, for a total of $118,819.62. Indeed, "'[a] party cannot stipulate a matter and then argue on appeal that the resultant action was error.'" *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 529; 695 NW2d 508 (2004), quoting *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001). Accordingly, the trial court erred in failing to follow this Court's directive to "order Frank to pay Sharon's outstanding attorney and expert fees and costs from December 18, 2001 . . . ." The trial court's award of $56,379.50 ($46,200 plus $10,179.50 in CPA fees from the October 4, 2005 order) was $62,440.12 less than the amount to which the parties stipulated. On remand, the trial court should award Sharon the entire $118,819.62 to which she is entitled.

Frank argues on cross-appeal that the trial court exceeded the scope of this Court's directive on remand in determining that Sharon's fees incurred on remand constituted appellate fees. This Court "order[ed] Frank to pay Sharon's outstanding attorney and expert fees and costs from December 18, 2001 forward, and that he pay Sharon's appellate fees as well." On remand, the trial court indicated its belief that "the Court of Appeals had in mind [that] [t]hose fees due or outstanding as of December 18, 2001 as well as expert fees and costs, together with subsequently incurred fees shall be paid by [Frank]." Frank argued that this Court's order was not intended to encompass fees incurred on remand. However, the trial court disagreed:

> I think these [remand] fees are clearly covered by the spirit of the Court of Appeals ruling. The only thing we're doing on remand is trying to implement what the Court of Appeals said to do as part of its appeal process. And it seems to me to separate that out. I can see, technically, where you're coming from; but I just can't buy that argument. I mean, I—you know how I feel about the fees. But I think the Court of Appeals expects me to order [Frank] to pay the fees associated with this case. And I just don't think it could be much clearer.

The trial court then ordered that "[a]ttorney fees, expert fees and costs incurred by [Sharon] in this Court during the remand proceedings following the November 18, 2004 Decision of the Michigan Court of Appeals are deemed to be 'appellate fees' as that term is used in the Decision of the Michigan Court of Appeals."

"The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court." *Sokel v Nickoli*, 356 Mich 460, 464; 97 NW2d 1 (1959). See also *VanderWall v Midkiff*, 186 Mich App 191, 196; 463 NW2d 219 (1990). Accordingly, it was well within the trial court's discretion to conclude that an award of the fees incurred on remand was warranted.

The trial court's award of attorney and expert fees and costs incurred after December 18, 2001, including appellate fees and fees incurred on remand, did not constitute an abuse of discretion. It is well settled that "[a] trial court may order one party to a divorce to pay the other party's reasonable attorney fees and litigation costs if the record supports a finding that financial assistance is necessary because the other party is unable to bear the expense of the action." *Olson v Olson*, 256 Mich App 619, 635; 671 NW2d 64 (2003). Further, a party should not be required to invade their assets to satisfy attorney fees when the party is relying on the same assets for support. *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). A trial court's decision regarding an award of attorney fees should, therefore, reflect the extent to which its award of property and spousal support leaves the parties with assets and income comparable to one another. *Hanaway v Hanaway*, 208 Mich App 278, 298-299; 527 NW2d 792 (1995).

Here, the trial court recognized the factors it was to consider in determining the reasonableness of attorney fees. Regarding fees incurred post-trial up to the time of the first appeal, Sharon documented and requested $78,052.57, and was awarded $37,458. Regarding appellate fees, Sharon documented and requested $116,307.49, and was awarded $35,769. Regarding fees incurred on remand, Sharon documented and requested $93,210.60, and was awarded $23,045. The trial court's award of quarterly payments in the amount of $55,625 to effectuate the property division constituted sufficient assets with which Sharon could use to satisfy the remaining $191,298.66 in attorney fees, without invading her award of spousal

support. On the record before us, we cannot conclude that these awards were outside the range of reasonable and principled outcomes. Therefore, there was no abuse of discretion.

Both parties also take issue with the trial court's award of spousal support. We review de novo as a question of law whether a trial court erred in failing to follow this Court's prior ruling. *Kalamazoo, supra* at 134-135. We review for clear error a trial court's factual findings relating to an award of spousal support. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *Id*. at 654-655. If a trial court's findings are not clearly erroneous, we must then decide whether the dispositional ruling was fair and equitable in light of the facts. *Id*. at 655.

On appeal, this Court determined that "the trial court reversibly erred in declining to award spousal support," and "remand[ed] for calculation of a figure supported by the record, not contrary to the parties' stipulations, and retroactive to the date of entry of the divorce judgment, with interest." On remand, the trial court initially made the following determination concerning spousal support:

> The court in determining the level of spousal support must consider the factors relevant to that issue, namely, the length of the marriage, the parties' ability to work, source and amount of property awarded to the parties; age of the parties; ability of the parties to pay spousal support; present situation of the parties; needs of the parties; the parties' prior standard of living and whether either is responsible for the support of others and general principles of equity.
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> When determining the level of spousal support, [Sharon] takes the position the court is not to consider the interest income she receives from property awarded to her. The court believes, however, that equitable considerations require the court to look at the whole picture created as a result of this divorce and property settlement and not to close its eyes to the practical effect of that distribution.
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> When considering each of the factors set forth above in relation to all the circumstances of this case, reflected in the days of testimony and the facts previously found by the court, the court is of the opinion that the sum of $50,000 per year is the appropriate level of spousal support to be awarded.

The trial court later awarded [Sharon] "interest on the $50,000 spousal support award set forth in this Court's August 7, 2005 Order, with such interest accruing at the prevailing judgment rate of interest from time to time from March 25, 2002 forward."

On remand, the trial court was bound to strictly comply with this Court's mandate, *Rodriguez, supra* at 514, yet it failed to do so. Our Supreme Court has directed that in making a spousal support determination, a trial court "shall make specific findings of fact regarding [the relevant *Sparks*] factors." *Sparks v Sparks*, 440 Mich 141, 159; 485 NW2d 893 (1992). Here, however, the trial court failed to make any factual findings whatsoever regarding the appropriate factors. Instead, the trial court simply awarded Sharon $50,000 per year in spousal support without stating the reasons in support of that amount.

Because there are no factual findings to review, we are unable address Frank's argument on cross-appeal that the spousal support award was not fair and equitable in light of the facts. *Moore*, *supra* at 654-655. Accordingly, remand is appropriate for the trial court to make factual findings on the existing record regarding the relevant *Sparks* factors, and to articulate on the record its basis for the award of spousal support.

Sharon next argues that the trial court's dispositional ruling regarding the distribution of the RMI valuation was erroneous. We review a trial court's dispositional ruling to determine if it was fair and equitable in light of the facts presented. *Baker v Baker*, 268 Mich App 578, 582; 710 NW2d 555 (2005). We should affirm the dispositional ruling, which is discretionary, unless we are left with the firm conviction that the ruling was inequitable. *Id*.

On appeal, this Court agreed that the trial court "reversibly erred when it reduced Frank's interest in [Robertson Morrison, Inc (RMI)], at Sharon's expense, by factoring in tax consequences of a potential sale or taxable event of RMI," and "order[ed] that on remand RMI's value of $4.5 million dollars be split 50-50." On remand, the trial court made the following determinations regarding the RMI valuation:

> 3. With respect to the mandate of the Michigan Court of Appeals that "on remand, RMI's value of $4.5 million dollars be split 50-50", the Court finds as follows:
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> - The Court of Appeals does not specify how or with what asset or assets or type of asset or assets this 50-50 split is to be accomplished. This Court specifically notes that the Court of Appeals did not order that a sum of cash, either awarded as a lump sum or via a stream of payments, be made by Plaintiff to Defendant. The Court of Appeals left wide discretion to this Court as to how to effectuate this portion of its ruling.
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> - With respect [to] its ruling on remand [that] this Court should award [Sharon] alimony "retroactive to the date of the entry of the divorce judgment", the Court of Appeals was very specific to say that this award should be "with interest". This Court notes that there was no reference to "with interest" in the award of additional value to Defendant resulting from the 50-50 division of the higher value of RMI.
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> - In this Court's March 25, 2002 Judgment of Divorce, this Court awarded all right, title and interest in RMI to [Frank] at a value determined by this Court to be $3,976,288. Because the parties had stipulated that the marital estate would be divided 50-50 and because RMI itself comprised a substantial portion of the total value of the marital estate, this Court also needed to rule as to how a 50-50 division of the marital estate would be effectuated with 100% of the value of RMI being awarded to [Frank]. In the Judgment of Divorce, this Court effectuated the 50-50 division of property by the means of a "cash equalizing payment" in the initial amount of $1,664,091, which amount was amortized over 10 years with interest at the rate of 6% per annum and quarterly payments of principal and interest in the amount of $55,625. This Court notes that this approach to the equalization of the division of property was neither challenged by

> [Sharon] in its appeal to the Michigan Court of Appeals nor was it independently criticized by the Court of Appeals in its November 18, 2004 Decision.
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> Based on the above findings, it is this Court's opinion that the appropriate and equitable way to effectuate the mandate of the Michigan Court of Appeals to split the $4.5 million dollar value of RMI 50-50 between the parties is the approach set forth in [Frank's] August 17, 2005 Motion to Determine Modification of Division of Property in Accord with Decision of Court of Appeals, to wit:
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> - $261,856 shall be added to the cash equalizing payment already provided for in paragraph H of "Property Division" of the March 25, 2002 Judgment of Divorce. $261,856 is one-half of $523,712 which is the additional value of RMI ordered by the Michigan Court of Appeals to be split 50-50 between the parties.
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> - Consistent with paragraph H of "Property Division" of the Judgment of Divorce, interest shall continue to accrue on the unpaid balance from time to time at 6% per annum and quarterly payments of principal and interest shall continue in the amount of $55,625. Interest at such rate on the additional $261,856 shall accrue from June 25, 2005 until paid in full.
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> - Attached hereto as Exhibit 1 is an amortization schedule which incorporates this Order of the Court.
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> - Paragraph I of the "Property Division" section of the March 25, 2002 Judgment of Divorce, "Security for the Cash Equalizing Payment" shall remain unchanged and in full force and effect.

To effectuate this Court's directive to equally divide RMI's value of $4.5 million between the parties, the trial court simply took the difference between the $4.5 million valuation and its original valuation of $3,976,288 ($523,712), divided it in half to get $261,856, and added that amount to the remaining balance of the amortization schedule as of March 2005 ($1,227,527.52) to arrive at a new principal balance of $1,489,383.52. To keep the quarterly payment of $55,625 the same, the amortization schedule was extended for more than one year.

However, this Court's determination, that the trial court erred in reducing the value of RMI by factoring in tax consequences of a potential sale or taxable event, makes clear that $4.5 million was the amount at which RMI should have been valued from the outset. The amortization schedule should have been adjusted to reflect this, back to the date of the judgment of divorce. The trial court's revised amortization schedule precludes Sharon from receiving interest on the entire $4.5 million during the first three years of the schedule, which, incidentally, are the years which would yield the most interest. Further, the trial court's revised amortization schedule increases the length of time over which the $4.5 million is amortized by more than one year. Indeed, this Court has recognized the "time value of money," in reference to the concept that "a dollar received today is worth more than a dollar to be received in the future." *ANR Pipeline Co v Dep't of Treas*, 266 Mich App 190, 194 n 2; 699 NW2d 707 (2005). The trial court's method of dividing the value RMI between the parties was not fair and equitable in light

of the facts of the case. Therefore, on remand the trial court shall modify the property award to fully account for Sharon's share in RMI.

Sharon also requests an award of attorney fees incurred on this appeal. MCR 3.206(C)(1) provides that "[a] party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action. . . ." MCR 3.206(C)(2) provides that "[a] party who requests attorney fees and expenses must allege facts sufficient to show that the party is unable to bear the expense of the action, and that the other party is able to pay. . . ." It is unclear from the facts at this point whether Sharon will be able to demonstrate that she is unable to bear the expense of this appeal, and whether Frank will be able to pay. We therefore remand for a determination, once all of the assets have been awarded and distributed, whether Sharon will be required to invade the assets on which she is relying for support to satisfy the attorney fees incurred on appeal. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). See also *Gates*, *supra* at 439.

Finally, Sharon requests that the trial judge be disqualified from presiding over this case. Because Sharon failed to moved for disqualification, this issue is unpreserved. MCR 2.003(A); *In re Jackson*, 199 Mich App 22, 29; 501 NW2d 182 (1993). We review unpreserved claims of error for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). Plain error warrants reversal where the error affected the fairness, integrity, or public reputation of the judicial proceeding. *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 610-611; 603 NW2d 824 (1999).

Initially, we note that the judge retired, and it is unlikely that he would be requested to return to the bench to hear this case. In any event, a judge will not be disqualified absent actual personal bias or prejudice. *Cain v Dep't of Corrections*, 451 Mich 470, 494-495; 548 NW2d 210 (1996); MCR 2.003(B)(1). A judge's opinions that are formed on the basis of facts introduced or events that occur during the proceedings do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. *Id*. at 496. Judicial rulings alone rarely establish disqualifying bias or prejudice. *Id*. Further, a party who challenges a judge for bias must overcome a heavy presumption of judicial impartiality. *Id*. at 497. Here, the record fails to show actual bias or prejudice on the part of the judge. No plain error occurred, and disqualification is not warranted under the facts of the case.

We affirm in part, reverse in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kurtis T. Wilder